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87-5379

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CASE NO.

A-23

HENRY PERRY SIRECI,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

		PAGE
TABLE OF AUTHORITIES		iii
STATEMENT OF THE CASE		1 - 3
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED		4
SUMMARY OF ARGUMENT		
I	PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY ANY ALLEGED COMMENT UPON THE EXERCISE OF HIS RIGHT TO REMAIN SILENT.	4 - 5
II	THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.	5
III	THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE.	5 - 6
IV	THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.	6
REASONS FOR DENYING THE WRIT		
I	PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY AN ALLEGED COMMENT UPON HIS RIGHT TO REMAIN SILENT.	7
II	THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.	8 - 9
III	THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE	10

TABLE OF CONTENTS
(Continued)

		PAGE
IV	THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.	11 - 12
CONCLUSION		12
CERTIFICATE OF SERVICE		13

TABLE OF AUTHORITIES

CASES	PAGE
Brown v. State, 381 So.2d 690 (Fla. 1980)	12
Chapman v. California, 386 U.S. 18 (1967)	7
Clark v. State, 363 So.2d 331 (Fla. 1978)	7
Doyle v. Ohio, 426 U.S. 610 (1976)	7
Elledge v. State, 346 So.2d 998 (Fla. 1977)	11
Hargrave v. State, 366 So.2d 1 (Fla. 1978)	8
Lucas v. State, 376 So.2d 1149 (Fla. 1979)	8
Provence v. State, 337 So.2d 783 (Fla. 1976)	11
State v. Jones, 204 So.2d 515 (Fla. 1967)	7
Stephens v. Zant, 631 Fed.2d 397 (5th Cir. 1980)	12
Wainwright v. Sykes, 433 U.S. 72 (1977)	8, 11

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Respondent, the State of Florida, respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner has broken up his Statement of the Case into two categories: trial phase and sentencing phase. He has classified the testimony during the trial phase into four general areas. Respondent would add the following in regard to these four general areas:

1. The first area concerns the discovery of the decedent and the description of the scene. Petitioner has neglected to mention that no keys to any cars were missing, nor were there any cars missing, from the scene (T 61-62). Furthermore, the decedent had various abrasions, slit neck, and fifty-five stab wounds all over his body (T 127).

2. The second area encompassed the testimony of Barbara Perkins and Bonnie Arnold. Petitioner told Perkins what happened at the car lot that night (T 194). He told Perkins that he was talking to the man about a car, he then hit the man in the head with the wrench, the man turned around,

Petitioner asked where the money was, the man wouldn't tell the Petitioner, so the Petitioner stabbed the man (T 194-195). Petitioner told Perkins he killed the man (T 195). Petitioner then indicated that he looked all over for the money and he couldn't find any, so he took the man's wallet (T 195).

Petitioner told Arnold that the police were looking for him because Petitioner had been at the car lot on the night in question to steal keys so that he could later steal a car (T 453). In so doing, Petitioner stated that he got in a fight with the car lot owner, and stabbed him (T 453). Petitioner stated to Arnold that he needed another car because his car wasn't in good shape, he didn't have clear title, and he was planning to leave Orlando, Florida (T 454). Petitioner stated that the car lot owner and Petitioner were talking about selling Petitioner a car, when Petitioner hit the decedent with a tire tool (T 455-456). A fight ensued, and Petitioner stabbed the decedent (T 455-456).

3. The third and fourth areas of testimony were in reference to the testimony of investigating officers, and others who were the recipients of Petitioner's statements. Petitioner and Donald Holtzinger discussed the crime for which Petitioner was incarcerated (T 280). Petitioner told Holtzinger about the crime of which Petitioner was charged, the fact that Petitioner killed the decedent, and the manner in which Petitioner killed the decedent (T 283).

Petiitoner spoke to his brother, Peter Sireci, about the homicide (T 416-417). Petitioner told him that he had certain credit cards from a car lot owner in Orlando, Florida, taken from the man whom he killed (T 420-421).

Petitioner told his brother-in-law, David Wilson, that Petitioner took credit cards off the body of a person whom he killed (T 491, 493, 497). Petitioner told Wilson that he killed the man with a knife (T 497). Later, Petitioner asked Wilson to

alter the knife (T 501). Petitioner told Wilson the details about the knife, and where the murder occurred (T 505-506). Subsequently, Wilson retrieved the knife from a wall ceiling of Petitioner's parents' house, and gave it to detectives (T 508). Petitioner had told Wilson where the murder weapon was (T 510).

When Petitioner was arrested, Detective Arbisi advised Petitioner of his rights (T 558-559, 597). Petitioner indicated that he did not get very much money from the decedent (T 598), and that the decedent did not offer much resistance (T 605).

In reference to the "sentencing phase" part of Petitioner's Statement of the Case, Respondent would add the following:

1. David Wilson, Petitioner's brother-in-law, employed Petitioner (S 14). He had known Petitioner for five years, and had seen him socially on occasion (S 14, 16). Petitioner was an average normal guy, a family man (S 18). Wilson was never aware that Petitioner had been cast out of his home, and Petitioner was, in fact, living with his parents (S 20). When Petitioner spoke to Wilson about the crime, and Wilson asked Petitioner why he stabbed the decedent so many times, Petitioner answered that he wanted to be sure the decedent was dead (S 18).

2. Barbara Perkins asked Petitioner why he murdered the decedent, and Petitioner stated that he did not want anybody to identify him (S 44, 45).

3. State Exhibit 50, indicating Petitioner's prior conviction for robbery was admitted into evidence (S 39).

4. Petitioner's own testimony at the sentencing phase indicated that the circumstances of his being "cast out of the home" were that he had a lot of arguments that broke the family up (S 59). They didn't go back to him, and he didn't go back to them (S 59). Petitioner said his dad did it mostly, but Petitioner was the one who left because of an argument. He was not bodily thrown out (S 59-60).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner states that the Federal questions were raised in the trial court by timely objection. This is not so. In reference to question one presented for certiorari review, no objection whatsoever was made in the trial court. Petitioner initially raised his objections in this regard on appeal. In reference to question four presented for certiorari review, Petitioner did not raise such an issue until after the Florida Supreme Court rendered its opinion affirming Petitioner's judgment and sentence. Respondent questions the timeliness of Petitioner's raising of this issue in view of the fact that Respondent discussed this exact matter in its answer brief in the Florida Supreme Court, and Petitioner failed to reply to this argument in his reply brief before the Florida Supreme Court (which was filed prior to the rendition of the Florida Supreme Court opinion).

SUMMARY OF ARGUMENT

I

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY ANY ALLEGED COMMENT UPON THE EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Petitioner failed to preserve this issue in the trial court by raising any objection to the alleged improper testimony. The State relied upon this failure to preserve in the Florida Supreme Court. The State further argued in the Florida Supreme Court that, in view of the overwhelming nature of the evidence against Petitioner, and the relatively innocuous nature of the comment in context, Petitioner's due process rights were not violated. The Florida Supreme Court implicitly recognized Petitioner's failure to properly preserve the matter in the trial court, for had Petitioner done so, the Florida Supreme Court, pursuant to its own case law, would have been obliged to reverse

Petitioner's judgment and sentence. The Florida Supreme Court further found that there was no denial of due process in light of the fact that Petitioner had made so many statements to so many people. The affirmance of Petitoner's judgment and sentence in this regard relies upon an independent State ground. Further, this Court has allowed for application of the harmless error doctrine in regards to such an issue. As such, no substantial Federal question is presented by this issue.

II

THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.

Florida Statutes specifically enumerate various "psychological" mitigating circumstances. There was substantial competent evidence to support the judge's and the jury's findings in rejecting Appellant's evidence in this regard. Any psychological or emotional disorders of Petitioner were, at most, personality disorders. Personality disorders were described as the least serious of all disorders. Petitioner is attempting to argue the applicability of the "psychological" mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing was presented which would have the effect of requiring the sentencing judge to accept Petitioner's conclusions regarding the applicability of the "psychological" mitigating circumstances.

III

THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE.

The trial judge clearly recognized his duty to consider any evidence in mitigation. He stated in his sentencing order,

"All evidence of mitigating circumstances may be considered by the judge or jury." (R 294). The judge furthermore recognized his duty to assess, by a process of reasoned judgment, what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present (R 294).

In reference to Petitioner's allegation that he was indeed deprived in presenting relevant mitigating evidence, this argument is without merit. The same jury heard all the evidence of guilt or innocence during the first phase of Petitioner's trial. A further repetition of evidence pointing to guilt or innocence in the sentencing phase would have been repetitive and pointless. No substantial Federal question has been presented by this point.

IV

THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.

The Florida Supreme Court found that the trial judge merely recited the two factors of "robbery-murder" and "pecuniary gain", but not give each one independent and separate weight. The Florida Supreme Court recognized that the trial judge indicated that he was aware that in valuating aggravating and mitigating circumstances he should not engage in a mere counting process of "X" number of aggravating circumstances and "Y" number of mitigating circumstances. Further, the Florida Supreme Court found that, in view of the other aggravating circumstances and the lack of mitigating circumstances, the sentence would not have been any different even if the trial judge did give improper "double weight" to two of the aggravating factors.

REASONS FOR DENYING THE WRIT

I

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY AN ALLEGED COMMENT UPON HIS RIGHT TO REMAIN SILENT.

Petitioner argues that Detective Nazarchuk's testimony regarding the fact that any interview with Petitioner was terminated when Petitioner requested his attorney after being given his rights, constitutes fundamental per se reversible error.

Petitioner raised no objection whatsoever to this testimony in the trial court. He initially raised the issue on appeal. The State relied upon and argued this factor in the Florida Supreme Court, citing the Florida Supreme Court's opinion in Clark v. State, 363 So.2d 331 (Fla. 1978). That case clearly stated on page 333 that the effect of a defendant's failure to object to such testimony had not previously been decided by the Florida Supreme Court. All cases cited by Petitioner in the instant Petition for Writ of Certiorari concerned a discussion of the issue in the context of a timely objection. The Florida Supreme Court stated in Clark, supra, that it has consistently held that even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. See also, Chapman v. California, 386 U.S. 18 (1967) and Doyle v. Ohio, 426 U.S. 610 (1976), wherein this Court declined to adopt a rule that the constitutional error of comment on silence should automatically require reversal of a conviction as Petitioners therein urged. This Court announced the test to be applied in determining whether a Federal constitutional error can be held harmless is whether the Court finds the error to be harmless beyond a reasonable doubt. The Florida Supreme Court has long recognized the contemporaneous objection rule. State v. Jones, 204 So.2d 515 (Fla. 1967). This Court also has recognized the

value of the contemporaneous objection rule, holding that a defendant's failure to make timely objection to the admissibility of his inculpatory statement, without a showing of cause and prejudice, barred Federal habeas corpus review of his Miranda claim. Wainwright v. Sykes, 433 U.S. 72 (1977).

Recognizing that Florida's contemporaneous objection rule precluded Petitioner's raising of the instant issue on direct appeal to the Florida Supreme Court, that court next undertook to analyze whether or not the alleged error, in the context of the instant case, could be considered fundamental error. In view of the overwhelming nature of the evidence against Petitioner, and the many statements Petitioner gave to so many people regarding his involvement in the criminal episode, the Florida Supreme Court concluded that due process had not been violated. Petitioner's rights were well protected by the Florida Supreme Court. No substantial Federal question has been cited regarding the instant issue.

II

THE SENTENCING JUDGE PROPERLY CONSIDERED AND REJECTED EVIDENCE OF PETITIONER'S ALLEGED MENTAL PROBLEMS.

Petitioner is arguing that the trial court failed to give proper weight to the evidence of his mental and/or emotional problems. The trial court heard all the evidence in this regard, considered it, and rejected it. The testimony simply did not rise to the level contemplated by the psychological mitigating circumstances. It has always been held in Florida that the findings of a judge in this regard are factual matters which are not to be disturbed (absent a lack of substantial competent evidence to support the judge's findings). Hargrave v. State, 366 So.2d 1 (Fla. 1978); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

There was indeed substantial competent evidence to support the judge's findings in this regard. Both Dr. Kirkland and Dr. Herrera testified that any psychological or emotional disorders of Petitioner were, at most, personality disorders (S 83, 97-98). Both doctors testified that personality disorders are a lesser degree of mental illness (S 83); Dr. Herrera testified that personality disorders would be the least serious of all mental disorders (S 106). While Dr. Kirkland indicated that a person in the Petitioner's situation could be under an extreme mental or emotional disturbance, he clarified this statement by saying that he could only state that such an individual does not handle pressure well (S 78-81). Dr. Herrera was not impressed at all with Petitioner's personality as causing an extreme mental or emotional disturbance at the time of the crime(S 94). It is to be noted that he twice examined Petitioner (S 93). He classified Petitioner's illness, if anything, as merely a sociopathic disorder (S 97-98). In essence, Petitioner is attempting to argue the applicability of the "psychological" mitigating circumstances merely by virtue of the fact that he discovered that his father was not his real father, and he had problems with his family as a result. Nothing was presented which could have the effect of requiring either the Florida Supreme Court or this Court to consider disturbing the findings of the judge. This is not a situation where the trial judge failed to consider the evidence in question. He considered it, and rejected it as being unworthy of having any mitigating weight in light of the evidence to the contrary (see, for example, David Wilson's testimony, previously stated). Again, no substantial Federal question has been presented.

III

THE TRIAL JUDGE DID NOT LIMIT HIS CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE IN FLORIDA'S STATUTE, NOR DID HE DEPRIVE PETITIONER FROM PRESENTING RELEVANT MITIGATING EVIDENCE.

Petitioner is arguing that the sentencing judge expressly limited himself to the statutory mitigating factors and refused to take into account any evidence of Petitioner's problems with his parents, etc. This simply was not the case. The trial judge clearly recognized his duty to consider any evidence in mitigation. "All evidence of mitigating circumstances may be considered by the judge or jury." (R 294). The judge furthermore recognized his duty to assess, by a process of reasoned judgment, what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present (R 294). The judge found no mitigating circumstances to be present.

Further, this is not a situation where the trial judge refused to hear certain evidence of mitigating circumstances, as Petitioner would have this Court believe. The same judge and jury heard all the evidence of guilt or innocence during the first phase of Petitioner's trial. The jury and judge were quite capable of making a determination as to the appropriateness of death, in light of the evidence of guilt of innocence as it was fully presented to them during the first phase of Petitioner's trial (even if there was some doubt which was less than a reasonable doubt in the minds of the jury and judge). A further repetition of evidence pointing to guilt or innocence in the sentencing phase would have been repetitive and pointless.

Again, there is no substantial Federal question presented by this point.

IV

THE FLORIDA SUPREME COURT DID NOT FIND THAT THE SENTENCING JUDGE IMPROPERLY "DOUBLED UP" AGGRAVATING CIRCUMSTANCES.

It is true that Petitioner could not have raised this issue in his initial brief on appeal to the Florida Supreme Court, because he could not have known what the Florida Supreme Court's ruling would be. However, in its answer brief to the Florida Supreme Court, Respondent argued to that court that even if there was an improper "doubling up" of aggravating circumstances, this would not necessarily mandate a reversal of Petitioner's sentence in light of Elledge v. State, 346 So.2d 998 (Fla. 1977). Subsequently, in his reply brief to the Florida Supreme Court, Petitioner made no attempt to argue the inapplicability of Elledge, supra. Finally, after the Florida Supreme Court rendered its opinion, Petitioner raised the issue for the first time on rehearing. Respondent submits that, again, this was too late, and the principles espoused in Wainwright v. Sykes, supra, preclude Federal review. The denial of the rehearing, wherein this issue was initially raised, by the Florida Supreme Court rested upon an independent State ground separate and apart from any Federal question.

Regardless of the above, by no means did the Florida Supreme Court concede that the trial judge improperly doubled the aggravating circumstances of "robbery" and "pecuniary gain." To the contrary, the Florida Supreme Court found that the trial judge merely recited the two factors, but did not give each one independent and separate weight. Indeed, in his findings of fact (R 295), the trial judge clearly stated that he was familiar with Provence v. State, 337 So.2d 783 (Fla. 1976), wherein the Florida Supreme Court stated that pecuniary gain cannot be doubled up with robbery such that the two factors are considered as separate aggravating circumstances. In his

findings of fact, the trial judge furthermore indicated that he was clearly aware that in evaluating the aggravating and mitigating circumstances, it was not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment (R 294).

Stephens v. Zant, 631 Fed.2d 397 (5th Cir. 1980) is simply not on point. Therein, the Fifth Circuit Court of Appeals stated that where (1) the sentencer improperly relied on an unconstitutional aggravating circumstance, and (2) it could not be determined that the sentence of death would have been the same absent this circumstance, the sentence must be set aside. Not only did the Florida Supreme Court find that the trial judge did not give improper "double weight" by merely reciting the two factors, but also the Florida Supreme Court found that, in view of the other aggravating circumstances and the lack of mitigating circumstances, the sentence would not have been any different even if the trial judge gave improper "double weight." Such is the standard that has been applied by the Florida Supreme Court. Brown v. State, 381 So.2d 690 (Fla. 1980), and this standard is quite consistent with Stephens v. Zant, supra, and due process.

Again, no substantial Federal question has been presented for review in this regard.

CONCLUSION

In light of the foregoing, Respondent respectfully requests that this Court deny the instant Petition for Writ of Certiorari to the Florida Supreme Court.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by courier/mail, to CRAIG S. BARNARD, ESQUIRE, Chief Assistant Public Defender, Harvey Building, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401, this 8th day of October, 1981.

Robert L. Bogen
Of Counsel

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981
CASE NO.
A-23

HENRY PERRY SIRECI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

STATEMENT OF MAILING

I HEREBY CERTIFY that the instant Response to Petition for Writ of Certiorari to the Supreme Court of Florida in the above-referenced case was deposited in a United States Post Office or mail box, with first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, within the time allowed for filing of the Response to Petition for Writ of Certiorari to the Supreme Court of Florida, i.e., by October 8, 1981 (30 days after receipt of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida in the above-styled case).

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SWORN to and SUBSCRIBED
before me this 6 day of
October, 1981.

Notary Public, State of Florida
My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA at LARGE
MY COMMISSION EXPIRES FEBRUARY 16, 1982
BONDED THRU MAYNARD BONDING AGENCY